ELECTION REFORMS: THE TREND TOWARD DEMOCRACY

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Broadly speaking, election is simply choice. In a narrower sense, the term is limited to the choice of persons for political offices, or for nomination to such offices, by the people, or by a somewhat numerous body as distinguished from appointment by a single person; or the determination of other questions submitted by law to popular vote.[1]

This paper seeks to present the general features of American laws in the nature of election reform, in the narrower sense, with especial reference to the decisions of the highest courts thereon.

When the thirteen original American colonies revolted against the mother country, their government was essentially that which had been evolved in a thousand years of struggle and conflict in England. But in details, there was as wide divergence as could well be imagined among people of practically common origin, race, religion and language. With the more permanent union under the federal constitution came an impulse to conform much governmental procedure to a common standard. Especially was this true in the matter of elections.[2] After one hundred and thirty years of trial and change, nearly all of the states vote on the same day, choose representatives in Congress, and presidential electors, as well as most other officers in the same manner, and do not differ very widely in methods of voting. The qualifications of electors are somewhat diverse, though probably less so than at the beginning, and everywhere the right of suffrage has been widely extended. The period of active assimilation to common standards lasted to the

[1] See 10 Amer. and Eng. Encyc. Law, p. 562.

[2] The people have no inherent power to hold elections. 10 A. and E. Enc. Law, p. 563; State v. Robinson, 1 Kansas 17; Jones v. State, 1 Kan. 273; State v. Thoman, 10 Kan. 191; Matthews v. Shawnee Co., 34 Kansas 606.

time of the civil war. Then the universal, extended and heated discussion of human rights, the fury of partisanship, the passions engendered in the great internecine conflict, the adoption of the thirteenth, fourteenth and fifteenth amendments, and following all this, the expansion of the nation in wealth and power, together with the accumulation of colossal fortunes and the growth of corporate importance and influence—all led to the trial and testing of the most fundamental and long-established rights of man, while every new measure in law, has had to run the gauntlet from the preliminary proposal in caucus, convention, primary, or elsewhere to the final decision thereon in the highest judicial tribunal. There was no final judicial inquiry into the right of suffrage until in 1857 in New York, and in 1859 in North Carolina; but such became numerous in the reconstruction period. From questioning new rights of black men, it was a short step to attacking old rights of white men.

How the matter of popular elections has grown in importance may in a degree be illustrated by the court decisions. The syllabi up to September 1, 1896, in all state and federal cases affecting elections, occupy 553 columns of a digest; and for the eight and a half years immediately following, up to April 1, 1905, 396 columns are so filled.[3] Seemingly nearly four-fifths as many points relative to the elective franchise have been passed on in less than a decade, as in the earlier one hundred and twenty years of free government. Except in one instance,[4] no question reached a court of last resort prior to 1890 on such matters, as the Australian ballot, factional nominations, and nomination papers, while in that year four such cases were decided in the New York court of appeals alone, and others in Montana and Missouri.

In the earlier, simpler, primitive days, an important aim was the securing to each state its rights, real or fancied; latterly more attention has been given to the rights of the individual to an effective share in government from its beginning in primary election, caucus, convention, or otherwise, within a party or without it, and continuing until his wishes are at last crystallized in the form of laws, and to protection against fraud, violence and intimidation while exercising the prerogatives of an enfranchised citizen. Not

[3] American Digest.

[4] Kentucky, 1889, on the Australian ballot for City of Louisville.

unknown are instances of denying rights already possessed, and restricting privileges long exercised.[5] There has been tyrannical suppression of individuals and classes. But the sweep of the years, though slow-moving, has been in consonance with the Declaration of Independence—"to secure these rights (to life, liberty and the pursuit of happiness), governments are instituted among men, deriving their just powers from the consent of the governed."

In the recent movement for election reforms, four lines of advance are marked: First. To secure the voter, by protecting him from evil influences, as is the object of the various "corrupt practices acts," and kindred laws, or by guarding him against fraud, intimidation and overawing, by means of an absolutely secret ballot, as under the Australian system; and by preventing as with voting-machines, any manipulation of ballots or count.[6] Second. To extend the franchise by reducing the qualifications of electors, and so making suffrage more nearly universal, as in the fifteenth amendment, and the laws enabling women to vote. Third. To increase popular control over officials and their acts, and over law-making, and over the initial steps in making nominations, as in making offices elective instead of appointive, in adopting the initiative and the referendum, and the recall, and in prescribing legal forms for primary elections and making nominations. Fourth. To secure more equitable representation of every individual, class, party or interest; to avoid the despotism of a majority, or, worse yet, a plurality; and to prevent the practical effacement of minorities.

1. To preserve the purity of elections, many states have "corrupt practices acts" forbidding the purchase of votes, directly or indirectly, by candidates, committees or others, with money, intoxicating liquors, cigars, promise of office, or otherwise. Some limit the amount of expenditures of candidates,[7] others require detailed sworn statements of campaign outlays to be publicly filed.[8] President Roosevelt in at least his last two messages urged Congress to enact stringent laws to prevent bribery and corruption in federal

[5] In 1835 North Carolina adopted a new constitution which took from free negroes the right to vote, which they had enjoyed from 1776.

[6] Incidentally venality is much discouraged by the uncertainty whether the vote-seller carries out his promise to "deliver the goods."

[7] Kansas Laws 1903, ch. 230, emasculated its corrupt practices law of the power to require sworn statements of expenses.

[8] Campaign expenses before the primaries are limited in Ohio and California.

elections, and to secure publicity of the expenses of candidates, parties and committees, and of the sources of contributions.[9]

Voting was doubtless at first *viva voce*. In some states, particularly in the South, elections were so conducted for many years, and in Kentucky this was in accordance with a constitutional provision.[10] For a number of reasons, however, voting by ballot was adopted in all the states, either originally, or superseding the *viva voce* method.[11]

The written or printed ballot was gradually perverted to such degree that in 1857 the legislature of South Australia adopted an official secret ballot, printed and paid for by the public, and wholly controlled and handled by public officers. The idea was speedily carried to England, spread over continental Europe, and at a somewhat later date reached the United States, where in some form, almost everywhere modified, it has become part of the electoral machinery in every state under the name of Australian ballot.[12] On

[9] In England and Canada similar laws have been enforced with great strictness, but in the United States, they are, in no inconsiderable degree, dead letters. A prosecution in North Carolina under Code, sec. 2715, which makes it a misdemeanor to injure, threaten, oppress or attempt to intimidate a voter at any election, was held properly quashed, where it appeared that the defendants expelled a voter from the church of which they were members, because he voted the Democratic ticket at a certain election. The court said that the voter had suffered no pecuniary loss, personal injury, or physical restraint by his expulsion. (1901) State v. Rogers, 128 N. C. 576; 38 S. E. 34. It can scarcely be doubted that in some denominations where membership is very highly regarded, excommunication for political reasons might become a potent engine of oppression and intimidation.

[10] Const. Ky. art. 8, sec. 15: "*viva voce* vote in all elections." *Viva voce* vote is common in legislative assemblies. In Michigan and elsewhere, recent laws governing political conventions, require *viva voce* vote by delegates to make sure that they vote as instructed. Kentucky Stat. 1899, sec. 4467, provides for a vote on graded common school tax, which has been construed (1903) to require a *viva voce* vote. Sisk v. Gardiner, 74 S. W. 686. Voting in town meetings is often by the voice, and also in school district meetings of the western states.

[11] In 1871 Congress made it obligatory to use written or printed ballots in electing representatives to Congress. Election by ballot implies the right to secrecy. (1871) William v. Stein, 38 Ind. 89, followed by the courts of Minnesota and New Jersey.

[12] Except in Massachusetts, St. Paul, Minnesota, and perhaps a few other places, "the trail of the serpent is over them all," in that the original form of the law has been modified to promote the interests of party, and the selfish schemes of politicians, and to hamper rather than aid, the expression of the popular wish. The original Australian ballot was a narrow slip on which the names of all candidates were printed, alphabetically or in other proper sequence, under the heads of the several offices to which they aspired. There was no "blanket sheet," nor corrals for parties, nor kindergarten pictures. An Ohio court well said: "The purpose of the Australian ballot law is to secure to the elector the exercise of that invaluable right, the elective franchise, and to protect him from fraud, mistake, or

first test in American courts the system was held to be unconstitutional, but it has later been sustained almost everywhere as being merely regulative.[13] The tendency of these laws has been to make elections more formal and less flexible. Changes on the ballot and "scratching" are no longer possible with the ease of the old private ballot system. But, in general, the voter's choice is not restricted to the names printed on the ballot.[14] Constitutional guaranties of secrecy are not impaired by those clauses which permit aid by election officers, to the disabled or illiterate, in marking the ballot.[15] In some states, as Tennessee and Maryland, illiterates are indirectly or partially disfranchised by laws which permit aid only to persons

the misapprehension of the judges of election." State v. Conser, 24 Ohio C. C. R 270.

[13] The Kentucky act of 1888 for Louisville was held void because illiterates were left unaided, when the constitution says "all elections shall be free and equal." (1889) Rogers v. Jacobs, 88 Ky. 502. "The legislature within the terms of the constitution may adopt such reasonable regulations and restrictions as may be deemed necessary to prevent intimidation, fraud, bribery, etc., provided that the voting be by ballot and that the person casting his vote may do so in absolute secrecy." Taylor v. Bleakley, 55 Ks. 1. See also Morris v. Bd. Com. City of Charleston, (W. Va. 1901) 38 S. E. 500; holding valid code 1899, ch. 3, sec. 34, though it requires the voter to scratch out the name of candidate not wanted and to write in another if desired.

[14] The contrary is the rule in England and some at least of her colonies where only regular nominees are eligible to the office, and a person whose name is not on the official ballot would not be declared elected, though receiving a majority of votes. 10 Am. and Eng. Encyc. Law, 633. Some American states incline to the English rule, among them South Dakota, which passed a law permitting only printed names of candidates to be placed on the official ballot. The constitution of South Dakota, art. 6, sec. 19, provides that elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. Art. 7, sec. 1 states the qualifications of an elector and declares that one possessing these qualifications shall be deemed a qualified elector at any election. The constitution makes no further provision as to the exercise of the right of suffrage. It was held that the legislature was not inhibited by the constitution from passing an election law requiring the names of all candidates to be certified according to law and to be printed on an official ballot, thus in effect denying the right of writing on an official ballot the name of a candidate which has not been properly certified. Chamberlin v. Wood, 15 S. D. 216; 88 N. W. 109, Fuller, P. J. dissenting strongly. (1901) The decisions growing out of the several statutes on the Australian ballot would make volumes. But they have largely to do with minor details, and with parasitic engraftments for partisan purposes. Hundreds of pages, for example, are occupied with discussions of the angle at which lines should meet or cross, to constitute an X, and the nature of marks to make them invalid as distinguishing marks. In all this lawmakers have shown a strong disposition to establish the reverse of Sir Philip Sidney's observation that "Laws are not made, like nets, to catch, but, like sea-marks, to guide." Two or more states have squarely decided that it is unconstitutional to restrict the voter to the printed names on the ballot. State v. Dillon, 14 Southern 383, (Fla.); Sauner v. Patton, 155 Ill., 553.

[15] Const. New York, art. 2, sec. 5; People v. McDonald, 52 N. Y. S. 898 (1896).

"that by reason of blindness or other physical disability" are unable to mark their ballots.[16] These laws have been sustained in the highest courts.[17] Regulations, if not too difficult, in the opinion of the court, are upheld, and likewise provisions that require a party[18] to have cast a certain percentage of the vote at the last preceding election before it may be entitled to an official ballot.[19] Even forcing a citizen to choose between voting under an obnoxious party heading or not at all, is, at least in New Jersey, viewed as no deprivation of his rights.[20]

In a number of states voting machines, which automatically register the voter's choice, have been authorized, and to some extent used.[21]

[16] "Dortsch law," Tenn. Acts 1890, ch. 24, sec. 16. The court says: "This does not necessarily require the voter to be able to read and write, since the fact that he cannot do either one does not necessarily render him unable to mark the ballot." Moore v. Sharp, 41 S. W. 587.

[17] Maryland act of 1901, ch. 2, is assumed, but not decided, to be constitutional in Summerson v. Schilling, 94 Md. 591; 51 At. 612 (1902).

[18] What is a party? A Philadelphia case says: "A combination of electors to be entitled to be called a party and to have a place on the official ballot must have polled two per centum of the highest (total) vote cast at the preceding election, and its object must be of general concern and as broad as the state itself." (1898) In re Obj. Citizens' Party, 1 Dauph. Co. R 328. "There may be the prescribed number of votes cast at the preceding election to constitute the aggregation a political party, but if the body does not avow a dogma or doctrine which invites support from the community at large and not a section or fragment of it, (as the cooperation of elements without a platform), it is not a political party within the legislative intent." In re Jeffries, 3 Dauph. Co. Rep. 291; In re Randall, 24 Pa. Co. Ct. Rep. 529. The supreme court of Pennsylvania, however, took a broader view, saying: "Any combination of electors with sufficient organization to act together for a common purpose and which organization has polled two per centum of the highest vote at the next preceding election, is a political party within act of June 10, 1893, sec. 2 (P. L. 419), and entitled to put nominations on the ballot by certificate." Independence Party Nominations, 208 Pa. 108; 57 Atl. 344. Such party may make nominations for county elections, though it claims to be Democratic on national issues. *Ib.*

[19] "The regulations prescribed by West Virginia Code, ch. 3, sec. 34, as to preparation of the ballot for the exercise of the constitutional right to vote, are reasonable and do not abridge or unduly impede the exercise of such right, although by disregarding them the voter disfranchises himself, provided such regulations are plain and may be easily observed. (1901) Daniel v. Simms, 49 W. Va. 554; 39 S. E. 690. Requiring a certain percentage of the total vote is pronounced a valid regulation to keep the number of ballots to be printed and distributed, within reasonable bounds. Ransom v. Black, 65 N. J. Law, 688. (1900).

[20] State v. Black, 54 N. J. Law 446; Ransom v. Black, 65 N. J. Law 688.

[21] In Rhode Island Pub. Laws 1900, ch. 744, sec. 1, cities and towns were forbidden to change to the old methods after adopting a voting machine. But a year later this was modified, and change was forbidden to be made within thirty days of an election. R. I. Pub. Laws 1901, ch. 859, sec. 3; In re Voting Machines, 50 Atl. 265. Ohio act 1902 (95 Ohio Laws 420) provides for voting machines on the

At this point mention may be made of compulsory voting, which has been seriously discussed as advisable to bring out otherwise good citizens who are apathetic as to their civic responsibilities. In 1898 the people of North Dakota adopted a constitutional amendment permitting the legislature to impose a penalty for failure to vote.[22]

2. Although the theory of the Declaration of Independence is broad, the practice as to the "consent of the governed" was decidedly limited at the time of the Revolution, and the ruling power in at least some of the states was vested in so few persons as to be oligarchic rather than popular. Property qualifications were often essential to the right of suffrage. These no longer exist in any state.[23] Also age, race, sex, citizenship, residence and payment of taxes determined a person's eligibility either to vote or to hold office, or both. A higher age is set generally in Europe, but in America twenty-one years is universally accepted as marking maturity for voting purposes. Race distinctions were wiped out by the fifteenth amendment to the constitution of the United States. Religious tests were always few, and are probably wholly abolished, the last effort being to bar Mormons in Nevada about twenty years ago, but held unconstitutional. Sex is no longer considered in Wyoming, Idaho, Utah and Colorado. While only males are fully enfranchised in the other states, suffrage has been given to females in many matters, particularly municipal and school. Only American citizens may vote in a large number of states, but in others aliens also who have declared their intentions to become citizens by nat-

petition of electors of a precinct, but mandamus will not compel the purchase of such machine if funds are not on hand to pay for the same. See State v. Bd. Elec. 24 Ohio C. C. R. 654 (1903). See Kansas Laws 1901, ch. 184, authorizing the use of voting machines.

[22] The latter part of sec. 127, Constitution of North Dakota, as adopted in 1898, reads: "The legislature shall by law establish an educational test as a qualification (to vote), and may prescribe penalties for failing, neglecting or refusing to vote at any general election." So far the legislature has not availed itself of the authority given to punish those who do not vote.

[23] The constitution of Idaho specifies that no property qualification may be required of a person to vote or hold office, except in school elections and elections creating indebtedness. Wiggin v. City of Lewiston, 69 Pac. 286. But property qualifications are retained in many cases in matters concerning taxation. "A property qualification is not void where it provides that those who pay for improvements shall determine whether they shall be made. Such voting does not constitute an exercise of the elective franchise so as to be void for reason of property qualifications." (California, 1897), People v. Reclamation District, 48 Pacific 1016.

uralization have full rights. In an anomalous position are Porto Ricans and Filipinos who are neither citizens nor aliens.[24] Residence where the elector offers to vote is always required, usually a year or more in the state, but sometimes less; and a shorter time in the county and voting precinct, or city and ward.[25] The extreme mobility of our population, so different from conditions in the Old World, or even earlier America, has led to a feeling that, in some way, the good citizen should be enabled to express his choice in national elections, though for any reason he may have moved from one state to another shortly before election; likewise that he save his vote for state and district officers and measures, though crossing county lines; and on county matters, though removing from precinct to precinct.[26] An effort to avert this temporary disfranchisement was made in Kansas by a law[27] permitting railroad employees to vote where their occupation happens to take them on election day. The payment of taxes has long been a pre-requisite to casting a ballot in Pennsylvania[28] and other eastern states. In the South, this requirement, as well as educational qualifications,[29] appears to gain ground.[30]

[24] A native-born Porto Rican cannot vote until naturalized, and there is no law to permit his naturalization. (1900) People v. Bd. Inspec. 67 N. Y. S. 236.

[25] "A person, though not in either the army or navy, cannot by long continuous residence on a United States reservation, acquire the right to vote at a state election in the county where the reservation is situated." (1897, South Dakota.) McMahon v. Polk, 73 N. W. 77. "A steamship clerk, living on the vessel and having no other residence, gains no voting domicile at the steamer's home port." (Maryland 1898) Howard v. Skinner, 40 Atl. 379. Nor can the steamer's purser change his voting domicile by residing on the vessel. (Md.) Jones v. Skinner, 40 Atl. 381.

[26] A restrictive law is Maryland Acts 1902, ch. 133, p. 204, (Code Pub. Gen. Laws, art. 33, sec. 25b) which provides that no person coming into the state from any other state shall be entitled to register as a voter until one year after his intent to become a legal voter shall be evidenced by an entry of intention, made in a record book to be kept by the county clerk. This is held by both state and United States supreme courts to be no denial of constitutional rights. Pope v. Williams, 56 Atlantic 543; affirmed by United States Supreme Court, Pope v. Williams, 191 (or 192) U. S. ——; 24 S. C. R. 573.

[27] Kansas Laws 1901, ch. 180. The employee may vote where convenient, and the ballot is sealed up and transmitted to the clerk of the county of his residence. This law has never been passed upon by the supreme court.

[28] Paying a tax, when none has been assessed, will not qualify to vote. (1900) Coudersport Registry list, 23 Pa. Co. Ct. Rep. 419.

[29] Constitution of Wyoming, art. 6, sec. 9: "No person shall have the right to vote who shall not be able to read and write the constitution of this state." This means English, and not a translation into a foreign tongue. Rasmussen v. Baker, 50 Pacific 819. (1897.)

[30] Arkansas 1901, sustained in Whitaker v. Watson, 68 Ark. 555. The constitution of Louisiana, 1898, makes payment of a poll tax of one dollar per year for

3. The extension of the subjects of popular decision has been most marked, and the drift is increasingly in that direction.[31] A further innovation, rapidly growing, is the expression of a wish or preference by the electorate where such vote is merely advisory and not binding. Office after office, once appointive, is made elective, and when so gained by the people is never surrendered again.[32] In 1776-1783 only Georgia, among the colonies, elected judges. To-day thirty-one states elect them. Then scarcely a governor was chosen by the people. At first presidential electors were named in a variety of ways.[33] But by 1832 the right had everywhere been yielded to the people. The very many resolutions of amendment offered in Congress providing for the election of United States Senators by direct vote, the passage of such measures repeatedly by the House, and the persistent, reiterated requests for this reform by various legislatures, all show a deep-seated popular desire.[34]

Scarcely had America copied from Australia her ballot system when, becoming adept as Rome in absorbing from surrounding nations, she borrowed from the Swiss the Latin terms Referendum and Initiative, although the principles thereby expressed are as long established on this continent as English settlements. For centuries among Germanic peoples there has been a steady transition of power. The right to petition the crown grew into legislation. Final

each of two years preceding the year in which he offers to vote, a prerequisite. State v. Cain, 52 La. An. 2120; 28 South 226. The spread of these educational and tax qualifications seems oftener inspired by a desire to disfranchise certain classes indirectly than by an honest conviction of the need to pay taxes or ability to read and write, as essential to good citizenship.

[31] Bryce says, "The Americans tend more and more to remove legislation from the legislature and entrust it to the people."

[32] Within seven years past the people of Kansas have taken to themselves the election of superintendent of insurance, railroad commissioners and state printer —the latter from the legislature, the others from the governor.

[33] Many states chose presidential electors by districts; some, as New York and South Carolina, by the legislature; in Pennsylvania by the judiciary; in Massachusetts the people named a number of candidates, and the legislature was limited to these in choosing the electors. (See the Connecticut plan for representatives in Congress about this time.) The district system was abandoned about 1832, and thereafter all states have chosen electors directly on a general ticket—"at large"—except that in 1892, Michigan temporarily reverted to the district plan.

[34] The constitution of Nebraska, adopted in 1875, provided that voters should be allowed "to express by ballot their preference for some person for the office of United States senator." This optional clause seems not to have been productive of results, if not, indeed, wholly ignored by the legislature, even when resorted to by the people.

power was transferred from king to parliament,[35] and now in turn it is passing from the legislative branch directly to the electorate.

None of the colonial charters, except those of Pennsylvania, had any provision for amendment,[36] and of the original states only Massachusetts and New Hampshire submitted their constitutions to the people for ratification. By 1787 provision for amendment hitherto wholly lacking in all state constitutions, unless Pennsylvania's, was added to eight of them.[37] The custom of amending constitutions by popular vote arose, and is now established in every state except Delaware. Thus changing the organic law, upon legislative initiative, has become commonplace. The next step—to permit the people themselves to initiate the change,[38] and finally for them to ratify or reject, and even to propose important laws—was slower of acceptance. Switzerland began this revolution in free government in 1830, and by 1848 had the principle embedded in its federal constitution.[39] About 1886 discussions of the Swiss institutions, and especially the initiative and referendum,[40] as seen by American students abroad, began to appear in leading American journals and magazines.[41] In 1898 South Dakota amended its constitution by adopting a provision for initiative[42] and referendum. In 1900 Utah

[35] Even the veto power of the British sovereign is only theoretical.

[36] Provision for amendment was made in the government of Pennsylvania from the first in the following instruments: Frame of Government, 1683; Frame of Government, 1696; Act of Settlement, 1683; Charter of Privileges, 1701; See Ames' Amends. to U. S. Const., Amer. Hist. Assn. Rpts. 1896, vol. 2, p. 13.

[37] Three states gave the power to the legislature, and five reserved amendments to conventions. Amer. Hist. Assn. 1896, *supra.*

[38] At the first session of Congress in 1860-61 Senator Crittenden made five different proposals to take the sense of the people on certain amendments to the constitution, then offered in view of the domestic difficulties which were swiftly leading to civil war. In 1869, Davis, of Kentucky, proposed in Congress that the fifteenth amendment, and all future amendments, be submitted to popular vote—a majority of votes in three-fourths of the states to be necessary for adoption.

[39] As an example of great questions determined by the people, note the Referendum, on Sunday, February 20, 1898, to the people of Switzerland, on the question: "Will you accept the federal law of October 15, 1897, for the purchase and administration of the railways by the Federation, and for the organization of Swiss federal railways? Yes. No." Carried by a vote of 384,148 (though lost some years earlier) to 177,130 against.

[40] Also, Prof. A. V. Dicey, of Oxford University, wrote for the *Nation*, in 1886.

[41] In Montana the question will be voted on in 1906. In Missouri, in 1904, a very complicated initiative and referendum amendment was voted down by a small majority. It had been purposely amended into an intricate and unworkable form by its enemies.

[42] The Initiative is thus defined in Article 29, of the canton of Zurich: "The right of voters to make proposals (the Initiative) is the right to demand the adoption, abrogation or modification of a law. * * * When an individual or

followed this example. In 1902 Oregon, by the decisive ratio of eleven to one in the popular vote, adopted the most clearly expressed section yet developed in our country. In 1904 Nevada added a similar feature to the organic law.[43]

In April, 1901, the matter of an initiative and referendum amendment first reached a supreme court, coming up in South Dakota, regarding acts to take immediate effect, passed under the emergency clause of the amendment. The court held that the legislature is sole judge as to what laws are "necessary for the immediate preservation of the public peace, health or safety, or support of the state government and its existing institutions."[44] The fundamental

a political body presents a proposal of this sort and it is supported by one-third of the members of the council it shall be submitted to the people for final action. * * * Likewise every proposal signed by 5,000 voters, or adopted in a certain number of communal assemblies by 5,000 voters, must be laid before the people whenever the cantonal council does not agree with it." The constitution of South Dakota says: "The people expressly reserve to themselves the right to propose measures." The Oregon constitution says: "The people reserve to themselves the power to propose laws." Utah's constitution says: "The legal voters (or a part thereof designated by the legislature) may initiate any desired legislation.

[43] The Referendum is defined in the Oregon constitution, thus: "The legislative authority of the state shall be vested in a legislative assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the constitution, and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the Initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon. The second power is the Referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety) either by petition signed by five per cent of the legal voters, or by the legislative assembly as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the Referendum is demanded. The veto power of the governor shall not extend to measures referred to the people."

[44] State v. Bacon, 14 S. Dak. 394; and 404; 85 N. W. 605. The legislatures of 1899 and 1901 in South Dakota attached emergency clauses to about one-half of their acts. The South Dakota amendment reads: "The legislative power of the State shall be vested in a legislature which shall consist of a Senate and House of Representatives, except that the people expressly reserve to themselves the right to propose measures, which measures the legislature shall enact and submit to a vote of the electors of the state, and also the right to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect (except such laws as may be necessary for the immediate preservation of the public peace, health or safety or support of the state government and its existing public institutions. Provided, that not more than five per centum of the qualified electors of the state shall be required to

principles involved were not questioned on either side. But in December, 1903, the initiative and referendum amendment was directly attacked in the supreme court of Oregon, and unanimously sustained. The court, per Bean, J., said: "Nor do we think the amendment void because in conflict with sec. 4 of art. 4, of the constitution of the United States, guaranteeing to every state a republican form of government. Now the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of government, or substituted another in its place. The government is still divided into legislative, executive and judicial departments, the duties of which are discharged by representatives selected by the people. Under this amendment, it is true, the people may exercise a legislative power, and may in effect veto or defeat bills passed and approved by the legislature and governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed." Although the question of the nature of laws initiated, or otherwise adopted by the people, upon reference to them, was not directly before the court, it[45] said: "Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes and may be amended or repealed by the legislature at will."[46]

Concerning that clause in the amendment which says: "The veto power of the governor shall not extend to measures referred to the people," the court held that this applies only to bills actually referred to the people, and not to all that might be referred, and that all acts not submitted to a referendum may be vetoed.[47] The

invoke either the initiative or the referendum. * * * The veto power of the executive shall not be exercised as to measures referred to a vote of the people. This section shall apply to municipalities." * * *

[45] Kadderly v. City of Portland, 74 Pacific 710; —— Oregon ——.

[46] The legislature of Wisconsin seemed to take a similar view, as in 1905 they amended the primary ballot law which had been adopted by popular vote in 1904.

[47] Kadderly v. City of Portland, 74 Pac. 710. This case follows that of South Dakota in holding that whether an emergency, under the constitution, exists, is solely a question for the legislature, and its determination final and binding on the courts. But whether the constitutional amendment itself was properly adopted and thus became part of the constitution is "always a question for the courts." *Ibid.* Under the Nebraska statute the signers for either initiative or referendum must

Utah and Nevada amendments have not been tested in court. Indeed, that of Utah is not self-executing, and the legislature has not yet enacted a method of procedure to give it effect. The South Dakota amendment specifically applies to municipalities as well as the state. Nebraska in 1898 enacted a general initiative and referendum statute for counties, townships, cities, villages and school districts.[48]

Since the time when "popular sovereignty" was a party shibboleth in the free—or slave—state controversy so many matters are frequently,[49] if not habitually, submitted to a vote, that such course no longer excites comment.[50] The charter of Greater New York

constitute fifteen per centum of the voters, while in South Dakota only five per cent is needed, and in Oregon eight per cent may initiate and five per cent may refer. Nebraska further requires a special election if twenty per cent of the voters request it. It has also a provision that where there is popular initiative the local legislative body may suggest amendments to the popular measure, and that both the measure and the amendment must be placed on the ballot. Unless a majority of votes are against both the popular measure and the legislative amendment the one receiving most votes becomes law.

[48] Arizona has also a municipal initiative and referendum statute. Brookline, Mass., a city of 20,000 population, has governed itself for nearly 200 years upon the popular referendum principle.

[49] Local option in the matter of permitting the sale of intoxicating liquors is perhaps the most familiar example. Such laws are not unconstitutional as delegation of legislative power. In re O'Brien, 76 Pac. 196 (Mont.). Other subjects of popular referendum are: laws relating to live stock, fences, public buildings, bridges, boundaries of counties, etc., issue of bonds, location of county seats, disposing of public property, aiding public improvements such as railroads, wells, mines, canals, etc., with gifts of subscription to the capital stock, police and fire departments, franchises for street railways, (in Nebraska), consolidation of contiguous cities, etc.

[50] In Kansas, the first legislature (1855) made no provision for popular initiative or referendum: But at the second session (1857) "An act to Incorporate the City of Atchison," (L. 1857, ch. 190, p. 264), in section 3, reads: "Provided, that a special election shall be first held in the said town of Atchison to take the sense of the qualified voters thereof, upon the question whether they will accept the charter of incorporation hereby conferred upon them or not. At said election, polls shall be opened at the usual place of voting in said town, which shall be headed as follows, respectively: "Charter." "No Charter." The special session of 1857 (third session in the state) referred the Lecompton constitution to the people. The legislature of 1859 referred the questions of counties borrowing money, and the location of county seats, and also whether or not to call a constitutional convention. In 1860 bond issues were referred to the people in four acts, and county boundaries in one act. The last territorial legislature, in 1861, passed two acts allowing the people to vote on county seats. The first state legislature, in 1861, referred the banking law, the location of the state capital, a constitutional amendment, and matters of county seats. Later referendums were: In 1862, two acts; in 1863, two acts; in 1864, bridges (two acts), jail, buying railroad stock, school bonds, county buildings, railroad bonds, county seats, and sale of the state's school lands. Thereafter at every session this has been done, and in the acts of 1905 no less than twenty-two times does the referendum appear, and the initiative fifteen times. In 1897 the resolution to submit an initiative and referendum amendment to the

was adopted upon a referendum, which method has become the rule rather than the exception in giving charters effect. Within the charters themselves, the Initiative and Referendum appears with increasing frequency.[51]

Many of the earlier acts referring matters to the people were assailed as unconstitutional on the ground of delegating legislative power to the people. The diverse decisions on the subject cannot be reconciled. Beginning with Delaware in 1847 and continuing to as late date as 1902, (in Ohio) various courts have pronounced such laws invalid.[52] On the other hand, the supreme court of Louisiana decided flatly in 1853 and again in 1854 that conditional legislation, to take effect upon popular approval, is not unconstitutional.[53] Then began some subtle and attenuated "distinguishing" among decisions.[54] Many courts came round to the position that "while the legislature cannot delegate its power to enact laws, it may provide that whether or not a law enacted shall be operative,

Kansas constitution lacked only eight votes in the House of the necessary two-thirds required to pass it. It required fifteen per cent of the voters on an initiative petition.

[51] Charters of San Francisco, Los Angeles, etc. Three states permit from five to eight per cent of the people to petition for a new charter. In five states cities are allowed to frame their own charters, restrained only by the state and national constitutions. The initiative petition in cities varies from five per cent in one city in Washington state, to fifty-one per cent in a Virginia city.

[52] Delaware, Pennsylvania, California, Indiana, Iowa, Michigan, Missouri, New York, New Hampshire, Ohio, Rhode Island, Texas, Utah. 10 Amer. Dig. c. 1393, also State v. Garverm, 66 Ohio St. 555; 64 N. E. 573. "The enactment of a law so that a provision of it might be partially suspended by a vote of the people of a municipal division of the state, is equivalent to a law made to take effect only upon being adopted by a vote of the people, and therefore void." Meshmeier v. State, 11 Ind. 484. Laws of New Hampshire 1879, ch. 4, to provide for minority representation in corporations, directed the first section to be submitted to. popular vote—held, unlawful delegation of legislative power. State v. Hayes, 61 N. H. 264.

[53] The Louisiana court said: "The act of March 12, 1852, authorizing police corporations to levy taxes for works of internal improvement, if approved by a majority of voters who are to bear the burden, is not inconsistent with the spirit of representative government, nor repugnant to the constitution." Police Jury v. McDonogh, 8 La. Ann. 341; New Orleans v. Graihle, 9 La. Ann. 561.

[54] The supreme court of California said: "Although a statute may be conditional, so that its taking effect may depend upon a subsequent event (say, a popular approval), yet this event must be one which shall produce such a change of circumstances that the lawmakers in their own judgment can declare it wise and expedient that the law shall take effect when the event shall occur." Ex parte Wall, 48 Cali. 279; 17 Am. Rep. 425. The changing attitude of courts suggests Pope's lines:

"Be not the first by whom the new is tried,
Nor yet the last to lay the old aside."

may be made to depend upon the popular will."[55] An interesting fact is that the courts in the southern states invariably upheld reference to the people, and that adverse decisions are very numerous in the north.[56] A peculiar referendum was attempted in Massachusetts, but was declared unconstitutional. The act provided for submitting the question of extending municipal suffrage to women, but by a special section allowed the women to vote on the proposition of their own enfranchisement.[57] Where there are constitutional clauses requiring some matters to be referred to the people, the rule of *expressio unius est exclusio alterius* has been invoked in opposing the submission of other laws to the people, but in vain.[58] The failure of the proper officers to provide for taking a vote at the first election after the passage of a referendum law, cannot defeat the will of the people, or deprive them of the option of acceptance or rejection. Until accepted by popular vote, the law takes effect only for the purpose of submission, and at a later election mandamus

[55] Massachusetts approved the referendum in 1826, in Wales v. Belcher, 20 Mass. 508, but later weakened in its position. Other approving courts are those of California, Illinois, Iowa, Kentucky, Minnesota, Missouri, New Hampshire, New York, New Jersey, Pennsylvania, Rhode Island, Tennessee, Vermont, West Virginia, Wisconsin and the United States circuit courts. See 10 Am. Dig. c. 1393. The Missouri court, in trying to distinguish between valid referendums and invalid delegation of legislative power, expressed itself more clearly perhaps than any other court, in these words: "Statutes creating municipal corporations, or authorizing them to incur obligations, may be referred to a vote of the district immediately affected. But the legislature must enact a complete and valid law according to prescribed usages; and it must derive its whole vigor from the legislature and no added efficacy from the popular vote." Lammert v. Lidwell, 62 Mo. 188.

[56] North Carolina act, March 11, 1901, authorizing a county to erect a court house, when ratified by the people, is not thereby invalid as a delegation of legislative authority, as such ratification is merely a condition precedent. Black v. Comrs. Buncombe Co., 129 N. C. 121; 39 S. E. 818. Alabama act, March 5, 1901, to change the boundary line between B. and C. counties, is not invalid as a delegation of legislative power, because not operative until approved by a two-thirds vote of the electors of the affected district. (1902) Jackson v. State, 31 So. 380. So with Mississippi act requiring a tax proposition to be submitted to the voters of the district proposed to be taxed. Alcorn v. Hamer, 38 Miss. 652 (1858).

[57] In re Municipal Suffrage to Women, 160 Mass. 486.

[58] The constitution of Michigan, art. 15, sec. 2, requires all bankruptcy laws to be submitted to the people. But this does not by implication forbid other laws to be so submitted. (1854) People v. Collins, 3 Mich. 343. The constitution of Kansas, art. 6, sec. 5, provides that school lands may be sold only after being authorized by a vote of the people; and art. 13, sec. 8, requires all banking laws to be submitted to the people. Whether these provisions bar other referendums does not seem to have been decided so far.

will lie to require the officials to hold the election properly.[59] In 1900 a movement began in Australia to make it obligatory to refer the matter to the people in case of a deadlock between the two houses on any bill or resolution.

The latest development of the principle is the advisory referendum and advisory initiative. As the name indicates, these simply show to the legislative and executive departments the will of their constituents, and no legal obligation rests upon the officials to give form to the popular expression. In 1901 Illinois enacted a "public opinion law."[60] Delaware has pending a constitutional amendment to establish the advisory initiative and referendum. In 1905 Texas enacted a very interesting experiment in the way of a primary election law, which not only provides for nomination of candidates by direct vote, but contains provision for the use of the initiative and referendum within party lines to direct party policy and determine what principles shall be promulgated in the party platform. Many city councils have voluntarily resorted to this method of learning the people's will.[61] In Buffalo, in the fall of 1905, three questions were to be so submitted. But the commissioner failed or refused to put the questions upon the voting machines at the proper time. Mandamus was brought in the supreme court. Thereupon Justice Krause granted the writ on one question—that relating to public ownership of a light and power plant by the city, but denied it on the other two, saying as to these: "They involve questions of legislation over which the city council manifestly has no power. Indeed, their very purpose is not to furnish information for the guidance of

[59] Albright v. Sussex Co. Lake and Park Co., 53 At. 612 (New Jersey, 1902).

[60] Under the Illinois law, ten per cent of the voters of the state, or twenty-five per cent of a municipality may propose any question of public policy, not exceeding three at one time, and have them submitted to popular vote. Under this, the remarkable referendum have been held in Chicago concerning the municipal policy toward ownership of street railways. In November, 1892, the legislature of California referred the question of election of United States senators by popular vote, and the vote being favorable, the legislature passed a resolution and sent it to Congress.

[61] Among them Buffalo, Detroit, Toronto and others. Cleveland's city council has submitted to vote the matter of granting franchises to two light, heat and power companies, and also the question of location of a high level bridge between east and west side of the city, giving opportunity for choice among three localities. Buffalo had taken an advisory referendum in 1904, and tried to submit three matters in 1905. The one which reached the people was adopted by a vote of five to one in favor of city ownership.

the local authorities; but they are peculiarly matters for the legislature."[62] [63]

When the federal constitution was submitted for ratification, many of the conventions in the several states, dissatisfied with certain features of, and more often with omissions in, the new instrument, offered amendments. These were numerous and varied, and some were later adopted. In New York and Rhode Island the conventions offered an amendment for the recall of United States Senators at the will of the legislature and the substitution of others. In 1803, and again in 1806, the Virginia legislature passed resolutions in support of such amendment for recall.[64] A revival and much broader application of the principle has lately been seen. In 1903 the city of Los Angeles, Cal., amended its charter by popular vote, and in addition to the initiative and referendum, it placed in the people's arsenal another powerful weapon, the recall.[65] A few words in the charter clearly define the recall.[66] In the special election in

[62] The question was: "Shall the City of Buffalo own and operate an electric light and power plant?" Justice Krause's upholding the right to refer the question without special statutory or constitutional authority, said: "Why may not the governing body take the opinion of its voters on the question, and adopt reasonable measures for obtaining that opinion? While in most instances public hearings and information disseminated through the public press and otherwise, may be adequate to enable the governing body to determine the question, yet it is not difficult to conceive a question of such magnitude and importance as to make it entirely proper and very desirable to take the opinion of the voters by a direct vote on the proposition, and it may well be that the question of municipal ownership of a lighting plant is of that character, and in that event it would seem that adequate power was given in the general welfare clause of the charter to provide for such a vote as incidental to the primary object." 9 Law Notes 168, Dec., 1905. It has been suggested that the council may properly consult an electrical engineer for expert advice (and pay him), and why not consult the people themselves?

[63] The forms of referendum here discussed have been either legislative or petitional (the initiative), whether in optional, or advisory, or obligatory and mandatory forms, and whether general or local. But the executive or judicial departments might refer matters to the people too.

[64] Early senators often felt a keen sense of responsibility to their constituents, and of obligation to express the people's wish. Several resigned, unwilling to follow instructions of the legislature, and too conscientious to vote their personal sentiments in defiance of the legislature. John Tyler resigned in 1836 rather than vote for the famous "expunging resolution," as instructed by the legislature of Virginia. Senator White, of Tennessee, resigned, 1839-40, because the legislature censured him, a Democrat, for having voted with the Whigs on some measure.

[65] Ratified and approved by the legislature of California, January 23, 1903. In Switzerland the recall has also been used, and is sometimes called the "imperative mandate."

[66] Los Angeles charter, sec. 198c: The holder of any elective office may be removed at any time by the electors qualified to vote for a successor of such incumbent. The procedure to effect the removal of an incumbent of an elective office

September, 1904, a councilman whose course in voting for two certain ordinances was not approved by his ward, was defeated by another candidate. The incumbent then petitioned the supreme court for a writ of mandamus to compel the rest of the council and city government generally to recognize him for the remainder of his term. Without deciding the point, the court assumed the validity of the recall amendment, but sustained the petitioner on the ground that the procedure in calling the special election was not quite regular. Even on this point Chief Justice Beatty dissented. In an inferior court, the matter had come up in another form, and Judge Ostler decided against the incumbent, holding that the recall amendment is not obnoxious to either the state or federal constitution, that it was not necessary to make charges in the petition for election, but simply to make statements of reasons to enlighten the public; that the officer had no property in the office nor vested right to hold to the end of his term; that it was no contract, but a mere agency, terminable at any time by the principal, the sovereign people.[67]

shall be as follows: A petition signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least twenty-five per cent of the entire vote for all candidates for the office, the incumbent of which is sought to be removed, cast at the last preceding general municipal election, demanding an election of a successor of the person sought to be removed, shall be filed with the city clerk; provided, that the petition sent to the council shall contain a general statement of the grounds for which the removal is sought. * * * Within ten days from the date of filing such petition the city clerk shall examine and from the great register ascertain whether or not said petition is signed by the requisite number of qualified electors, and, if necessary, the council shall allow him extra help for that purpose. * * * If, by the clerk's certificate the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate. * * * If the petition shall be found sufficient, the clerk shall submit the same to the council without delay. If the petition shall be found sufficient the city council shall order, and fix a date for holding the said election, not less than thirty days nor more than forty days from date of clerk's certificate to council that a sufficient is filed. (Election shall be held as other city elections.) The successor of any officer so removed shall hold office during the unexpired term of his predecessor. Any person sought to be removed may be a candidate to succeed himself, and unless he requests otherwise, in writing, the clerk shall place his name on the official ballot without nomination. * * * In any such removal election, the candidate receiving the highest number of votes shall be declared elected. At such election if some other person than the incumbent receives the highest number of votes, the incumbent shall thereupon be deemed removed from office upon qualification of his successor. * * * If the incumbent receives the highest number of votes, he shall continue in office."

[67] Other cities also have adopted the Recall. In Los Angeles, the incumbent was J. P. Davenport, and in the Recall election he was defeated by Dr. Arthur D. Houghton by a vote of 2,338 to 1,584, the district being the Sixth ward. In the

With the general adoption of the Australian ballot, whether pure or modified,[68] a certain rigidity and official formality was introduced, which makes independent action,[69] or the rejection of "regular" party candidates, however unworthy they be, increasingly difficult.[70] This put a premium upon the control of conventions, and

supreme court Davenport contended that the Recall is unconstitutional—"has no place in the general system of the American form of representative government and undertakes to give a part of the people in their primitive capacity the power to make laws, which resides only in the legislature," also that "the Recall, even if valid, could not be retroactive and could not apply to the petitioner, who had been elected and installed in office before the amendment went into effect at the date of its ratification by the state legislature." Davenport v. City Los Angeles, 80 Pac. 684. April 5, 1905. Beatty, C. J., dissenting, said: "The people of Los Angeles have chosen to make an experiment in municipal government by applying to municipal business a principle and practice which obtains universally in the conduct of private affairs. They propose to appoint their agents, not absolutely for any fixed term, but for a term of two years, subject to the condition that their authority may be revoked whenever they have forfeited public confidence by any failure of diligence, or lack of capacity in dealing with the matters confided to their discretion. The success or failure of this experiment is exclusively an affair of the people who have chosen to make it, and if it is not an infringement of the constitution, it is the business of the courts to let it have a fair trial. If found to involve evil consequences, no doubt it will be repealed, but in the meantime its policy or impolicy is a question with which courts are not concerned." 80 Pac. 6888.

[68] Only Massachusetts and a few places like St. Paul, Minn., have the real "fraud-proof" Australian ballot, in which the candidates' names follow each other on the narrow ballot, in alphabetical or other regular sequence, under the names of the respective offices—all candidates for governor, for example, are under the heading of governor. There is no "blanket ballot," nor party columns, nor displays of poultry and other emblems.

[69] The lengths that men have gone to in attempting to force voters to adhere to a party is indicated partially in the case of Ginter v. Scott, 2 Dauphin Co. Rep. 93 (a Pennsylvania common pleas case, 1899), wherein the court, to protect a voter in his independence, said: "A member of long standing in a political party does not lose his membership by merely signing a nomination paper for a candidate of another party, nor by occasional voting for one or more candidates of another party."

[70] Minnesota Gen. Laws 1901, ch. 216, sec. 9, prohibits a candidate who has sought nomination from a political party at a primary election, and has been unsuccessful, from having his name printed on the official ballot as an independent candidate for the same office. The court said that this is a reasonable regulation, since the blank space enables him to be elected if the requisite number of qualified citizens vote for him; that the law is not obnoxious to Const., art. 7, sec. 7, providing that any person entitled to vote is eligible to office; that the constitution does not guarantee the candidate to equal advantages in all practical conditions, nor prohibit the legislature from imposing on him fair and reasonable restrictions in soliciting support at the polls. The legislature may recognize the existence of political parties, and regulate within reasonable limits the means by which partisan efforts should be protected. State v. Moore, 87 Minn. 308; 92 N. W. 4. Missouri act Mch. 5, 1897, sec. 4796g, forbids the nomination of a delegation to a convention by a body of twenty qualified electors if twenty others have already nominated such delegation. "The statutes of North Dakota contemplate that only nominations made by a convention representing a political party or principle shall be

party machinery, and the naming of party candidates by whatever means.[71] To secure a fair, untrammeled expression of popular will in the initiatory step of making nominations, a system of primary election laws has been evolved, and now exists in almost every state.[72] The early forms applied where parties voluntarily in primary elections made nominations sometimes of candidates by direct vote, but more often only of delegates to conventions, all under party management and control, subject to such public laws; the later forms are mandatory, requiring all parties to nominate candidates, or delegates, at an official primary election under public control. The usual course of evolution has been to hold primaries for naming delegates, and then to assume the nomination of all candidates without the intervention of delegates.[73] About 1879 or 1880 a primary election law was enacted in Kentucky,[74] but no obligation was imposed on any party or per-

filed with the secretary of state to be certified to the proper county auditors." (1900) State v. Falley, 9 N. D. 450; 83 N. W. 860. In several states laws were passed aimed against the "fusion" of different parties upon candidates, and forbidding the name of any candidate from appearing in more than one place or column on the ballot. In some instances this has gone to the length of requiring an unqualified falsehood to be printed upon the ballot in the words, "No Nomination," if a candidate were nominated by a second party or endorsed. See Kansas' law. In California it has been held unconstitutional to forbid a name from appearing in more than one party column. (1902) Murphy v. Curry, 70 Pac. 461; 137 Cali. 479. In North Dakota it has been held constitutional and reasonable to limit a candidate's name to one column, when he was nominated by a single party and also by petition. Rev. Codes, 1899, sec. 491; State v. Porter, 100 N. W. 1080. (1904) See Com. v. Martin, 20 Pa. Co. Ct. Rep. 645 (1897). See State v. Metcalfe, 100 N. W. 923 (S. D. 1904) on rival candidates for same office in the same party. On intra-party contests, see State v. Houser, 100 N. W. 964, Wis. 1904.

[71] For example, in re Clinton Co., 48 N. Y. S. 407 (1897) describes the arbitrary control of a convention: 600 voters came to a room that would not hold over 200. One faction got the room, and more than half the voters were unable to get in. The "in" faction chose delegates *viva voce*, and adjourned in ten minutes. Then the others came in, elected a chairman, called to order in the same room, and a vote by ballot was taken for delegates, all voters being given opportunity to vote. It was decided that the delegates elected by the second organization were the "regular" delegates. Such examples have become frequent, as well as "packed caucuses," "snap calls," and stricter rules and tests till but a few of a boss's henchmen are "the party."

[72] Primary election laws seem to be of purely American origin.

[73] The irresponsible nature of delegate conventions has been strongly depicted by Governor La Follette, of Wisconsin, in his messages and elsewhere.

[74] For many years parties, especially the Republicans, in various counties of Kansas, voluntarily nominated county candidates by direct vote, calling this the "Crawford county system."

sons to nominate candidates[75] by primary election.[76] In 1895, almost simultaneously, several states adopted compulsory primary laws[77] limiting their operation at first to one or several large cities,[78] and later extending them over the state in either a mandatory or an optional form. So widely do these enactments differ that it is hard to deduce general statements of their features. Many have been upheld, and not a few overthrown. There has been a general tendency to substitute mandatory for optional laws. After a bitter fight, extending over a series of years, Wisconsin, by a majority of over 50,000, adopted a mandatory primary election law in 1904 that provides for nomination by direct vote of almost all officers[79] from the smallest up to candidates for United States Senators,[80] by all par-

[75] The principles of primary control have been generally upheld as constitutional. Matter of House Bill No. 203, 9 Colo. 631; State v. Jensen, 89 N. W. 1126 (Minn., 1902); "Primary elections are so far matters of public concern that they are, at the discretion of the legislature, proper objects of reasonable statutory regulation under the police power." Hopper v. Stack, 56 At. 1 (New Jersey, 1903).

[76] Kansas passed a primary law in 1891.

[77] Massachusetts, 1894; California for San Francisco, and in 1897 extended over state: Wisconsin for Milwaukee, and in 1897 extended over state; Michigan; Minnesota for Minneapolis. The Wisconsin law was mandatory on cities over 10,000 population, and optional elsewhere; but its laws of 1903 and 1905 are mandatory everywhere. The California law, sec. 1368 Pol. Code, is mandatory in certain cities, and no convention can be recognized as in law entitled to make nominations unless the delegates thereto were elected under the provisions of said law. This applies to parties which at the last election polled three per cent of the entire vote of the city (sec. 1186). Ellis v. Wheatley, city clk., 81 Pac. 1105 (1905). Oreg. Laws, 1901, cities of 10,000 population and over.

[78] Where corrupt and arbitrary control was most apparent and most dangerous, Indiana Acts, 1901, p. 475, is a primary election law for all counties with a city of over 50,000 population which casts 10 per cent of the total vote. State v. Elliott, 63 N. E. 222.

[79] Excepting school superintendents and the judiciary.

[80] Governor Robt. M. La Follette, in his message to the Wisconsin legislature of 1901, after urging the passage of a primary election law, giving his reasons therefor, expressed his view of the trend of affairs in these words: "A decade will leave scarcely a trace of the complicated machinery (of the caucus and convention) in existence in any state in the Union." A primary law was passed in 1903, and was submitted to popular vote in 1904. It has been slightly amended in minor matters in 1905, and at the special session of 1905, December. The Australian ballot system is used. Each voter is given a ballot of each party, all securely fastened together in a bunch. In the secrecy of the booth the voter abstracts his party ticket from the bunch, votes it, folds it and the unused ballots, hands each to the election officers, who drop his ballot into one box and the unused ballots into another. The latter box is emptied at once at the close of the polls and its contents destroyed without examination. A plurality of votes is required for a nomination. Two or more bills, following Governor La Follette's recommendations, were introduced in the legislature at the special session of December, 1905, providing for a majority vote to nominate, and securing the same by a preferential ballot, on which the voter should indicate his first and second choice by Arabic numerals,

ties upon the same day at the same polling places and with the same election officers, who are publicly chosen from the two leading parties in the state.[81] In 1900 California expressly recognized the primary election by a constitutional provision, and empowered the legislature to prescribe conditions on which voters may participate in such elections.[82] The constitution of Mississippi, section 247, declares that the legislature shall enact laws to secure fairness primary elections. Where the primaries are official and mandatory, all expenses are paid by the public,[83] where they are voluntary cost falls on the party holding them.[84] Myriads of questions have arisen out of these elections, and legislatures have sought in a variety of ways to solve them. The proclivity of some voters to take part in all primaries[85] has been an ever-present problem in

instead of X, after the names of candidates, but they were all lost by small majorities.

[81] New York has an "Annual Primary Day" for all parties, Laws, 1898, ch. 179, amended by Laws, 1899, ch. 473. Committeemen for the parties are also chosen then, and so, too, in Wisconsin. People v. Kings Co., 168 N. Y. 639; 61 N. E. 1133. Also California laws of 1895 and 1897.

[82] In pursuance of this authority, the legislature of California has provided that voter at the primary election must declare his *bona fide* present intention of supporting the nominees of such political party at the next election, and if challenged, he must swear that it is his intention to support the nominees of the convention to which delegates are to be chosen at such primary election. Pol. Code, sec. 1367, Rebstock v. Sup. Ct. of San Francisco, 80 Pac. 65. Act 1898 (93 Ohio Laws, p. 93), sec. 7, provides that papers to secure the nomination of candidates for public office shall contain a provision that each signer thereto pledges himself to support and vote for the candidates whose nominations are therein requested. Such law is not void as a restriction of the right of suffrage, since it operates uniformly and impartially on all classes of electors, and interposes no unreasonable impediment to the right to vote. State v. Poston, 59 Ohio 122; 52 N. E. 196.

[83] "Primary elections may be held under supervision of the public, at public expense." Ladd v. Holmes, 66 Pac. 714, construing Oregon session laws 1901, p. 317. Such laws are not invalid on the ground that taxpayers may have to contribute to the support of a party of which they do not approve. (1902) Com. v. Rogers, 181 Mass., 184; 63 N. E. 421, construing stat. 1898, c 548.

[84] Some laws permit the party officials to withhold a nominee's name from the ballot at the general election, or to refuse to certify it to the public officers, unless he first pay his share of the expenses of the primary. Kentucky stat., sec. 1564. Montgomery v. Chelf. 82 S. W. 388.

[85] This evil is not confined to primaries. A number of states have forbidden voters to sign nomination papers of more than one candidate for the same office, as in Kentucky; also Rhode Island Gen. Laws, 1896, ch. 11, sec. 13, which requires further that the voter himself subscribe such papers. For another to sign his name will not suffice. Atty. Gen. v. Clarke, 59 At. 395. Where a person joins in the nomination of a candidate when he has theretofore joined in the nomination certificate of another candidate, his signature to the second papers must be disregarded. (1903) in re Smith, 85 N. Y. S. 14, requiring a voter to declare his intention to support the nominees of the party in whose primaries he wishes to vote, is pronounced, in California, to be "absolutely essential to the proper workings of

those states that permit the several parties to hold their primaries at different times and places.[86] Where it is entirely optional with a party whether or not to nominate by primaries, having decided affirmatively, the party must conduct such election strictly in accordance with the statutes.[87] The first primary laws made past acts the test of qualification to take part in a party primary election.[88] But later laws incline to accept future intentions instead,[89] while New Jersey, at least, requires both faith and works.[90] Kentucky's court has held that the constitutional provisions relating to elections do not apply to primary elections, but most courts that have considered the subject take the opposite view.[91] Massachusetts holds that a primary

any primary law. By the mere offer to vote for delegates to a convention of any party the elector does in effect declare his intent to support the nominees of such convention, and the oath is provided for as a guaranty of the truth of the declaration already made by such offer to vote. * * * Such law is not in violation of Const. art. 2, sec. 5, which says that 'all elections by the people shall be by ballot or by such other method as may be prescribed by law, provided that secrecy in voting be preserved.'" Rebstock v. Sup. Ct., 80 Pac. 65.

[86] Massachusetts stat., 1898, ch. 548, sec. 91: "No person voting at the caucus of one political party shall be entitled to vote or take part in that of another within the ensuing twelve months." (1902) Com. v. Rogers, 181 Mass. 184.

[87] Kentucky stat., 1903, ch. 41, art. 12; Brown v. Republican Co. Exec. Com., 68 S. W. 622; Young v. Beckham, 72 S. W. 1092; Mason v. Byrley, 84 S. W. 767.

[88] "A legislative provision that the voter at the primary election shall make affidavit that at the last general election at which he voted, he voted for a majority of the candidates of the party with which he is proposing to act, violates no constitutional right of such voter." (New Jersey, 1903) Hopper v. Stack, 56 Atlantic 1. Under one Kentucky act each voter was asked at registration for the general election, "Do you wish to register for the purpose of participating in the primaries of the political party with which you affiliate?" He did not need to answer, but if he did, the answer was recorded, and the next year he could vote only as he had chosen the year before. Wisconsin's acts of 1895 and 1897 were simply for the election of delegates at the primaries. Any voter must be freely allowed to take part, but if challenged, must swear that he voted at the last election for the party with which he seeks to act. New York, in 1898, provided for enrolling as members of a party, the year before the election, but required the voter's choice to be kept secret by the election officers until after such later election.

[89] Massachusetts was the first state to make future intentions the test. Under California's laws of 1895 and 1897 the elector could vote for any one party that he stated upon oath he intended to support. Before the change in the constitution, a California law (Acts 1897, p. 115) regulating primary elections, and providing an oath that the voter intended to support the nominees selected by the delegates chosen at such primary, as a test of his right to vote thereat, and debarring certain classes of legal citizens, was held unconstitutional, as special legislation. Calif. Const., art. 2, sec. 1; Spier v. Baker, 52 Pac. 659.

[90] New Jersey Laws, 1904, ch. 241.

[91] Const. Kentucky, sec. 6, providing that "all elections shall be free and equal," has no application to primary elections. (1904) Montgomery v. Chelf, 82 S. W. 388. But the contrary view is expressed in California and Oregon. Cali. Acts, 1897, p. 115, limited the right to vote at primary elections to persons whose "names appear on the great or precinct register of the county at the last general election."

law is not unconstitutional in authorizing printing on the ballots the names of candidates presented by a certain number of voters if blanks are left for the insertion of the names of other candidates not so presented.[92] But Minnesota denies this poor boon to voter and candidate, and says that no blanks need be left in which to write a name.[93] In many instances only parties casting a certain percentage of the total vote are privileged to avail themselves of the mandatory laws, and such limitation has been upheld where ample provision is made for nominations in other ways by the minor parties.[94] In some of the laws the procedure is minutely detailed;

This was contrary to Const. art. 2, sec. 1. The act also permitted to vote at the primaries all persons naturalized thirty days and over, while the constitution says ninety days. For both reasons the act was void. Oregon Laws, 1901, p. 317, prescribed the way to select at a primary election delegates to nominating conventions. The court said that the act does not conflict with Const. art. 2, sec. 1, guaranteeing that "all elections shall be free and equal." Ladd v. Holmes, 66 Pac. 714. "Nor does limiting the right of party electors to voting at their respective party primaries" conflict with Const. art. 2, sec. 2, that "qualified electors shall be entitled to vote at all elections authorized by law." *Ib.* 66, p. 714.

[92] Mass. stat., 1898, ch. 548; Com. v. Rogers, 63 N. E. 421 (1902).

[93] State v. Johnson, 91 N. W. 604; 840 (Minn., 1902). Mississippi sustains as constitutional Laws 1902, ch. 66, p. 105, whereby candidates, in order to have their names on the official ballot, must have been nominated at a primary election. McInnis v. Thames, 80 Miss. 617. Where a primary election law provides for nominations of candidates for certain offices, it has been held that it repeals by implication all other methods of party nomination to such offices, whether by convention or otherwise. State v. Jensen, 89 N. W. 1126 (Minn. 1902). But a contrary view has also been expressed. State v. Stafford, 97 N. W. 921; 1043, Wisconsin, 1904, construing Laws, 1899, sec. 41. In conventions whose delegates are nominated by primary election, no proxies can be recognized unless specifically authorized by law. Ky. stat., 1903, Mason v. Byrley, 84 S. W. 767; Montgomery v. Chelf, 82 S. W. 388. Nor may proxies act upon committees. *Ibid.* The order of a political committee permitting to vote at a primary election all youths who would come of age before the general election, has been disapproved by one court; but it added that such votes would not invalidate the election as to a person who was not a candidate thereat. Montgomery v. Chelf, 82 S. W. 388, Ky.

[94] N. Y. Laws, 1899, ch. 473, sec. 13; In re Wood, 74 N. Y. S. 403. This law requires a party to cast three per cent of the total vote. So with the Calif. Pol. Code, secs. 1357-1375. Oregon Sess. Laws, 1901, p. 317, sec. 25 denies the benefits of the act to parties falling below a certain vote, but permits such to make nominations in other ways, and hence is not in conflict with Const. art. 1, sec. 20, prohibiting special privileges to any class of citizens, "since the act is but a reasonable regulation of larger parties, designed to safeguard the privileges of electors thereof, and is not an infringement of the rights of minority parties." Ladd v. Holmes, 66 Pac. 714. "Though it also prescribes a test for party affiliation, and directs the manner of electing committeemen, and fixes their term of office, it is not an unwarrantable invasion of the rights of political parties, nor an infringement of the rights of the people peaceably to assemble to consult for the common good, and prohibiting the impairment of rights and privileges retained by the people, under Const. art. 1, sec. 26 and 33, but is merely a regulation of party management designed to secure to the voters a free expression of their will." *Ibid.* If a party is required to have three per cent of the entire vote of the state to entitle it to a

others are very brief and general. Some leave much to the party rules and machinery already in existence, or that may be provided, and even expressly declare that the party's rules shall govern in matters not provided for in the law.[95] While the provisions of a primary

place on the ballot to be used in the primary election for delegates, it is then entitled to a place on the congressional district ballot, though not casting three per cent of the vote of such district. Pol. Code, Calif., sec. 1357-1375. (1904) Gaylord v. Curry, 78 Pac. 548. There are some sinister indications of attempts to throttle absolutely very small minorities and of utterly preventing the formation of new parties. See 89 Ohio Laws, p. 434, sec. 6, in which certificates of nomination of candidates for public office must be made "by a convention, committee, meeting of qualified electors, primary election held by such electors, or central or executive committee representing a political party that at the last preceding election polled at least one per cent of the entire vote cast in the state. This has been held not repugnant to any provision of the constitution. (1898, State v. Poston, 51 N. E. 150 Ohio). The California courts seem to have stood firm against the oppression of minorities. Primary Elec. stat. 1899, p. 47, was held to conflict with Const. art. 1, sec. 21, which denies to any citizen or class of citizens any privilege or immunity which on the same terms shall not be granted to all citizens. Said law "provided an exclusive scheme controlling all political parties in holding their conventions for nominating candidates to public office, but denied the benefits of the act to parties that did not cast three per cent of the total vote at the last preceding election." The court said, "this statute not only discriminates between political parties, but works the disfranchisement of voters, or compels them, if they vote at all, to vote for a representative of a political party other than that to which they belong." Britton v. Bd. Elec. Comrs. City and Co. of San Francisco, 129 Calif. 337; 61 Pac. 1115 (1900.) Further, the court held that the law contravened, "art. 1, sec. 10, Const., giving the people the right 'to assemble together to consult for the common good,' also art. 1, sec. 11, providing that all laws of a general nature shall have a uniform operation, since it discriminates as above stated." Also, that "such law requiring primary elections of all parties to be held at the same time and under the control of the county board of election commissioners, and providing for the use of but one ticket at such election, which is received by the intending voter without question as to his political affiliation and taken into the privacy of a booth, where he may name such delegates as he desires to, one or another of the political parties, whether he is a member of the party or not, is an unwarranted invasion of the rights of political parties and an innovation of the rights reserved to the people by Const. art. 1, sec. 23, providing that the rights enumerated shall not be construed to impair or deny others retained by the people." *Ibid.*

[95] But if a county committee decides to hold a primary under the law, the state committee of the same party cannot forbid such county election; and "equity will restrain the state committee from removing the county committee and from appointing a new committee, and from attempting to prevent the holding of the primary election called by the county committee." Neal v. Young, 75 S. W. 1082, (Kentucky, 1903). Nor will the court enjoin holding a primary election called by a committee of the party pursuant to Ky. stat., art. 12, sec. 41, Meachem v. Young, S. W. 1094. (1903) Nor may the governing committee of any party question the eligibility of any candidate before the primary and refuse to place his name on the ballot. Young v. Beckham, 72 S. W. 1092 (Ky., 1903). To reject candidates is left to the voters of the party. Where a state committee decided to elect its members at the general state primary under the same election commissioners and clerks that the law provides, the parish committee could not legally add commissioners to act with the state's commissioners in the election, and such

law may apply only to general elections, seemingly to the exclusion of special elections, it is not therefore a special law within the constitutional meaning of the term,[96] and in all elections to which the act does not apply the old statutes will govern as before the passage of a primary law.[97] Nor is a law rendered special by requiring direct choice of the candidates in a single ward or township, while for larger divisions delegates are selected to hold nominating conventions. A New York statute distinguishes between municipal and other elections in determining party affiliations, so that a man may claim party regularity, though voting differently at will in city affairs.[98] The inalienable right of the people to call Cincinnatus and Putnam from their plows when the office seeks the man, has been vindicated by the supreme court of Michigan.[99]

4. Ever since men first espoused the doctrine of majority rule in popular government students have been perplexed by the problems presented when three or more candidates for one office, or three or more solutions of one question have been before the people. Likewise, the utter elimination of the minority from a voice in affairs, and its treatment as a wholly negligible factor, has troubled philosophers and statesmen who desire justice and truly representa-

additional appointment may be enjoined. State v. St. Paul, 111 La. 713; 35 So. 838. (La. 1903.) See the provision that party rules govern until legally changed by New York Prim. Elect. Law, 1899, ch. 473, sec. 9, subdiv. 2. People v. Dem. Gen. Com. N. Y. Co., 67 N. E. 898 (1903); Also People v. Kings Co., 168 N. Y. 639. A New York law required that the proceedings of conventions must be carefully kept, and publicly filed, and that party rules, if changed, must be publicly filed within three days thereafter.

[96] Rhode Island, P. Laws 1903, p. 603, being act April 14, 1903; Hopper v. Stack, 56 At. 1.

[97] Ladd v. Holmes, 66 Pac. 714, Oregon.

[98] North Carolina Code, sec. 2687, required separate ballots and separate ballot boxes for state, congressional, judicial, legislative and county offices. State v. Nicholson, 102 N. C. 465 (1889). Kansas Laws, ch. 228, L. 1903, provides for a general ballot containing national, state, congressional, legislative and judicial candidates, a separate township ballot, a separate city ballot, and another ballot for constitutional amendments and other matters referred to the people, with separate ballot-boxes for each class of ballots. Such laws encourage the voter to distinguish among the issues involved in nation, township, city, etc.

[99] Kent Co. Prim. Elec. Law (Local Acts Mich, 1903), p. 142, No. 326, sec. provided that before the name of any candidate may be placed on the ballot at a primary election, such person shall on oath declare his purpose to become a candidate. This was held violative of Const., art. 18, sec. 1, which prescribes the oath that shall be required of public officers, and that no other oath shall be required as a qualification for any office. Says the court: "By the added qualification, voters are precluded from choosing as a candidate one who declines to himself seek the office." Dapper v. Smith, 101 N. W. 60 (1904).

tive government.[100] In the early history of this nation five or more of the original commonwealths chose their representatives in Congress on a general ticket;[101] five chose by districts, and this system gradually spread, until in 1842 it was made mandatory.[102] Numerous constitutional amendments were offered, especially in the early days, to elect presidential electors by districts and representatives by districts. In 1877, and again in 1888, Maish, of Pennsylvania, presented resolutions of amendment dividing the electoral votes of each state in proportion to the popular vote for the several candidates. Many states provide for the distribution of election boards and some few other offices among political parties, usually between the two leading parties. In 1870 Illinois adopted a constitution with a section[103] to secure proportional representation, or, more properly, minority representation in the legislature. Quite a number of proportional measures have been passed in the different states, but most of them have been pronounced to be unconstitutional.

[100] In 1780 the Duke of Richmond introduced a bill in Parliament, with a clause for minority representation. From 1857 to 1862 John Stuart Mill, Rowland Hill (the pioneer for cheaper postage), and Thomas Hare, in England, and Miss Catharine H. Spence, of Australia, discussed proportional representation extensively in their writings. "Equal quorums to elect members" was actually tried in Adelaide, Australia, in 1840. Mill remarked the despotism of majorities, and said: "In a really equal democracy every section would be represented proportionally. In private corporations, the right of minority representation has been deemed of enough importance to protect it by constitutional guarantees. See Constitutions of Pennsylvania, California, art. 12, sec. 12; Nebraska, art. 11, sec. 5; West Virginia, art. 11, sec. 7; Missouri, art. 12, sec. 6. Other states, as Ohio, Kansas, Kentucky and New York, as well as Great Britain, by statute or otherwise, secure to minority stockholders a share in the board of directors. In the Fifty-fourth Congress Tom Johnson, of Ohio, introduced a bill for proportional representation. If by some cataclysm all Republicans were utterly extirpated in the southern states, leaving all the Democrats; or if by some means all Democrats were removed from New England, the change would scarcely be noticed politically in those sections, so completely is the minority ignored in government.

[101] Or, as we more commonly say, "by the state at large." In Connecticut a preliminary election was held to nominate three times the number of congressmen to be chosen, and at a second election the number to which the state was entitled was elected from these. Am. Hist. Assn. Rpts. 1896, Vol. 2, 56. The "Randolph" plan in the constitutional convention was proportional in one sense.

[102] Curiously enough, while the lower house of Congress was thus tending to be more representative, the system of electing presidential electors was changing from district and other forms to a general ticket. In 1828 only three states chose their representatives from the state at large.

[103] Const. Ill., art. 4, secs. 7 and 8: "In all elections for representatives each voter may cast as many votes for one candidate as there are representatives to be elected in the district, or may distribute the same, or equal parts thereof, among the candidates, as he shall see fit, and the candidates highest shall be declared elected." Three representatives are elected from each senatorial district. This is the "cumulative" plan used in private corporations.

In March, 1889, the Michigan legislature enacted a law[104] embodying the "cumulative" plan to represent the minority. It was held unconstitutional.[105] In the opinion, Chief Justice Champlin discusses the matter philosophically and historically, and describes the four plans known as the "restrictive" or "limited vote," the "cumulative," the "Geneva," "free vote" or "Gilpin" plan, and the "Hare" or "single vote" system.[106] To this there has since been added per-

[104] Maynard v. Bd. Canvassers, 84 Mich. 228; 47 N. W. 756 (1890). The chief justice said: "There has been in the latter half of the present century a growing desire to secure to minorities a proportionate representation in legislative and corporate bodies, and from time to time schemes have been advocated by those who have desired to bring about what they claim is a reform in existing modes of election to secure to the minority a just and proportional representation. These schemes may well be all reduced to four well-defined classes, viz.: (1) The "restrictive," which requires a certain number of candidates to be elected, and prohibits any elector from voting for the whole number to be elected. Thus if four are to be chosen no one may vote for more than two. (2) The "cumulative," which requires three or more to be elected, and permits each elector to cast as many votes as there are persons to be elected, and to distribute these votes among the candidates as the elector may choose. (3) The "Geneva," "free vote," or "Gilpin" plan. By this plan the districts are required to be large, and each party puts in nomination a full ticket and each voter casts a single ballot. The whole number of ballots cast having been ascertained, that sum is divided by the number of places to be filled and each ticket, or party, is entitled to places in proportion to the number of votes cast for such ticket (or party), taking the persons elected from the head of the tickets. (4) The fourth plan is what is known as the "Hare" or "single vote." It requires successive counts and redistribution of votes until an election is reached. The court adds, concerning the "free vote" plan: "This doubtless comes nearest to a proportionate representation of the minority of any plan devised, which is practical for popular elections. It was originated by Thomas Gilpin in 1844, who advocated it in a pamphlet published in Philadelphia. It has never been adopted in this country, but has become the 'free list' (*list libre*) of Geneva, and is said to work well in Switzerland." It is not wholly essential to the "free vote" that a full ticket be nominated, but only about the number of candidates that the party expects to elect, with one or two added to meet the contingency of an increased vote.

[105] The law (Mich. Acts, No. 254, March, 1889) reads: "In districts where more than one representative is to be elected, each qualified elector may cast as many votes for one candidate as there are representatives to be elected or may distribute the same among the candidates as he may see fit, and the candidates highest in votes shall be declared elected. * * * Opposite the name of each person voted for there shall be written or printed in plain figures the number of times the elector intends to vote for said person in whole numbers, provided that in case the total of the numbers opposite the names of the persons voted for exceed the total number of representatives to be elected from that district, the excess shall be taken from the person so voted for lowest on the ticket, and should there still be an excess then from the next above, until the numbers correspond."

[106] The "Hare" plan has been modified somewhat by Miss Spence and by Alfred Cridge, and is now usually called the "Hare-Spence," or "Hare-Cridge" plan. It is a modification of the "free vote" by letting the voter express a first and second, and possibly more, choices. The object is that if his favorite candidate gets more than enough votes to elect—that is, more than the necessary quota—or falls far short of getting enough votes to elect, the voter's vote will not be wholly lost,

haps as fifth the "Gove" plan.[107] The "restrictive" or "limited vote" plan has been used in American elections more than any other method designed to assure representation of a minority. The Pennsylvania constitution prescribed the limited vote for judges of the supreme court, county commissioners and some other officers. The principle has been extended by simple statutory enactments in the Keystone state and upheld there. But similar laws in Ohio, Jersey and Rhode Island have been repeatedly pronounced unconstitutional.[108] In foreign countries the system is frequently

but may be transferred to his second, or later, choice among candidates (or measures).

[107] The "Gove" plan takes its name from an active and prominent legislator of Salem, Mass., William H. Gove, who devised the plan and actively supported it. The Gove plan is perhaps but a variation of some of the other plans, and its prominent feature is that the elector votes for but one candidate, and the candidate has the right to transfer his surplus votes, or his insufficient vote, to other candidates whom he has publicly named beforehand. The supporters of the Hare and Gove plans prefer to call such systems "effective voting," instead of proportional representation, because more votes are "effective," that is, are cast for candidates who are elected, than under the conventional majority or plurality vote.

[108] Jury commissioners were so named in Pennsylvania. Seven judges of the superior court were to be chosen, and the legislature permitted each voter to vote for but six candidates. The act was upheld as not contravening Const. Pa., art. 1, sec. 5—"all elections shall be free and equal." Com. v. Reeder, 171 Pa. 505; 33 At. 67, construing act of June 24, 1895. That certain offices were filled by a limited vote under the constitution did not by implication forbid the legislature from using the same method in filling other offices under the rule, *Expression unius est exclusio alterius*. The decisions in Pennsylvania cannot be reconciled with those in three other states. Ohio Act April 21, 1884, authorized electing four members of the police board at the same election, but denied to electors the right to vote for more than two candidates—held, to conflict with the constitutional provision that each elector shall be entitled to vote at all elections. State v. Constantine, 42 Ohio St. 437. Under Rhode Island Const., art. 2, sec. 1, and Amend. art. 7, sec. 1, qualified electors have the right to vote in the election of all civil officers and a statute providing that each voter shall vote for but one candidate for the town council, and that the five receiving the most votes shall be declared elected, is void. In re Opinion of Judges, 41 At. 1009 (1898). Two different provisions in New Jersey statutes for the choice of members of the boards of excise commissioners by limited vote have been held unconstitutional. Act March 22, 1901 (P. L. p. 408), established an excise board of four members for a city, two to be elected at the first election following, for two years and two for one year; and that annually thereafter two shall be chosen for two years, but that no party shall nominate more than one candidate, and that no ballot shall contain the name of more than one candidate. This was held to be inhibited by Const., art. 2, sec. 1, which declares that every voter shall be entitled to vote for all officers that now are or hereafter may be elective by the people, since this law permits each voter to vote for only half the members of the board to be elected at each election. McArdle v. City of Jersey City, 49 At. 1013 (1901). Also Act of April 8, 1884, amended June 1, 1886 (2 Gen. St., p. 1806), provided a board of excise commissioners of five members to be elected on a general ticket, with restriction that no voter shall vote for more than three, and the five receiving the highest votes shall be elected.

used.[109] The "cumulative" plan is much used in corporations, and some attempt has been made to apply it in general elections, the Illinois selection of its lower house being the most prominent example. Beginning in 1874, Ohio, too, used this method for awhile in selecting legislatures. In 1889 it was applied in Boston to choosing aldermen. In Michigan the attempt so to elect the lower house was held void, as has been stated.[110] The "free vote" has gained no foothold in our land, but is much used in Europe.[111] The Hare-Spence plan has been in use in some parts of Denmark since 1856, also in Tasmania, parts of Australia and New Zealand.[112]

The "preferential ballot," which is a prominent feature of the Hare-Spence method of securing proportional representation, has also been used where single candidates are to be chosen to

Unconstitutional. Bowden v. Bedell, 53 At. 198 (N. J., 1902); Smith v. City Perth Amboy, 56, At. 145 (N. J., 1903).

[109] Japan elects her House of Commons by a single untransferrable vote in districts returning from five to fifteen members each. Belgium also uses the single vote.

[110] Pennsylvania act of June 2, 1871, applied the cumulative vote in electing town councilmen. Com. v. Shoener, 1 Leg. Chron. 177; 18 Am. Dig. 249u. Senator Buckalew, of that state, was very enthusiastic in working for proportional representation in the state and in Congress. In the Michigan decision (Maynard v. Bd. Canvassers, 84 Mich. 228), the act was found to conflict with three sections of the constitution: Art. 4, secs. 2 and 3, securing representative government; art. 7, sec. 2, providing for election of representatives by ballot from single districts, and art. 7, sec. 1, entitling every male citizen of twenty-one years to vote at all elections. The latter clause was said to imply that no voter should cast more than one vote, as he could do by cumulation. Just after the civil war, Senator Buckalew urged a cumulative system for electing members of Congress and the committee unanimously recommended a measure for passage. The Michigan court in saying that all cumulative voting in corporations was authorized by express constitutional provisions evidently overlooked the case of Horton v. Wilder, 48 Kansas 222, which sustains cumulative voting in corporations under ch. 61, sec. 1, laws of Kansas, 1876, which has no specific constitutional sanction. In Illinois it has been held that the mention of cumulative voting in the constitution does not thereby deny power to the legislature to apply the system to other offices, as trustees of sanitary districts. People v. Nelson, 133 Ill. 565. The cumulative plan has been severely criticised (as in the Michigan case) as likely by reason of great excess of votes given to a very popular candidate to result in the election of a majority of candidates by a minority party or parties. Abroad the cumulative plan seems confined to the Swiss canton of Zug, and the choice of school boards in Great Britain.

[111] Belgium, in 1899, adopted the free list with single vote. Italy has used it since 1882, and four or five cantons in Switzerland have the free list.

[112] Called the "Andræ" system in Denmark. Some form of proportional representation is used in Belgian municipalities, locally in Norway, and in electing representatives at Rio Janeiro, Brazil. Six elections were held in Tasmania for members of Parliament, including its senators to the Australian commonwealth The voter expressed first, second, etc., choice among candidates.

office in order to assure a majority choice among three or more candidates.[113]

Even this simple survey of events shows strongly the steady advance of the electorate in taking power into their own hands. If any mistrust the people—if any have misgivings lest the masses be incapable of using wisely the powers they have assumed, he may find relief in the thought that whereas the average mature American of the year 1800 had enjoyed but eighty-two days of schooling in his life, his descendant of to-day receives 1,034 days' public instruction. The trend toward democracy may be the result of men's conscious, deliberate design; it may be unconscious destiny.

States are not great,
Except as men may make them.
Men are not great except they do and dare;
But states, like men,
Have destinies that take them,
That bear them on, not knowing how or where.

[113] In many presidential elections, especially since 1856, the man elected had not a majority of popular votes. The chance of a minority to elect an executive officer has been shown often in New York City, and strikingly in the late 1905 election, and also in Boston. In the latter city, in 1905, Fitzgerald was elected by a plurality of 48 per cent of the total vote. A preferential ballot would either have proved that he was first, or second choice of a majority of the voters, or would have defeated him. The total vote was 92,404, divided thus: Fitzgerald, Dem., 44,316; Frothingham, Rep., 35,936; Dewey, Ind. Rep., 11,637; Watson, Ind. Dem., and Cit., 515. Two or more bills were introduced in the Wisconsin special session of the legislature in December, 1905, but were lost by small majorities. Governor La Follette had recommended consideration of such measures with a view to avoid nominations by a minority under the new primary election law. The unproportional results of the present system of electing legislative officers is shown remarkably in Kansas, in the congressional elections beginning with 1890. In 1890, with 122,682 votes, the Republicans elected but two members of Congress, while the People's Party, with only 18,000 more votes (140,768) secured five members. Two years later, though gaining 36,000 votes, to the Populist gain of only 18,000, the Republicans gained but one member. In 1894, however, the Republicans elected six out of the seven members with 150,013 votes, while the Populists, with 109,971, saved but one member, and he by a narrow plurality. In 1896, though gaining 9,000 votes, the Republicans lost four of their six Congressmen, while the fusionists gained four on a gain of 56,000 in popular vote. Ignoring the non-fusion Democratic and scattering vote in 1890, 140,768 Populists had five representatives in Congress, while 122,682 Republicans had but two. In 1892 the division was nearly or quite equitable. In 1894 150,013 Republicans outvoted 109,971 Populists in the ratio of six to one. In 1896 only two members represented 159,699 Republican citizens, while five represented 166,504 fusion voters. Since 1898 the representation of non-Republicans has fallen off until, for several years, they are as wholly unrepresented as though they did not exist.